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THE CONSTITUTION, THE CIVILIAN, AND MILITARY JUSTICE

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FUNDAMENTALS of constitutional law remain the same from generation to generation; its manifestations continually change with the changing circumstances of man's life. The boundary between justice for the soldier and justice for the civilian offers one example. We have come far since the day of small professional armies which gave rise to our concepts of military justice; since the day when the soldier lived apart from the rest of society; since, within a generally civilian people, he dwelt in a small isolated group subject to his own laws and customs, apart from his fellow man. Like all the rest of us, the man-at-arms has been much affected by those technological and organizational changes which, in war, turn the efforts of a whole society toward victory in the field, and which, even in what we call peace, require that we maintain millions of men, basically civilians, enrolled for a time in the armed forces. We station garrisons abroad at scores of points, and send whole families along. And the technological developments which have made war more and more a branch of mechanical engineering, which have made victory dependent on the skilled manipulation and maintenance of innumerable intricate machines, not only make necessary profound changes in the training of military men, but, even more striking, call into association with men-at-arms increasing numbers of civilian scientists, technologists, and specialists of all sorts who keep the machines of war in operation.

This change toward partly civilian military forces makes more difficult and delicate the establishment of a balance between the individual's claim to all the careful procedures

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of the judicial process and, on the other hand, the necessity for unquestioning discipline which is the essence of military survival. Military law, like the law generally, tends to lag behind social and technological development. This paper treats, in a general way, of the adaptation of constitutional law to this new order, where in substance, if not in theory, the status of soldier merges more and more with that of civilian.

None of these matters is entirely new. Renaissance artillerymen were often civilian technicians, respected by the soldiery for knowledge of difficult mysteries. The memoirs of Baroness von Riedesel demonstrate that those who today share the comparatively pleasant life of civilian dependents in one of our far-called military installations, had predecessors who faced sterner tests as they moved down the Lakes with Burgoyne's column. The War of Independence had its sutlers, waggoners, and laundresses. Civilian "packers" were famous ninety years ago, with our armies on the plains, for hardihood in Indian warfare, for mastery of pack-animals, and for resistance to certain sober aspects of military regimentation. The civilian paymaster-clerk was for many generations a necessary functionary with the forces afloat. But in our day, the discipline of civilians who follow the flag takes on a new quality because of their sheer numbers. One remembers, between 1941 and 1945, the Red Cross people overseas, the UNRRA functionaries, the merchant mariners, the political advisers who accompanied major commanders with their civilian specialists and secretaries, demonstrating that under modern conditions Clausewitz's dichotomy between war and diplomacy had become less clear. Within the past few months, the expenditures of military dependents abroad have been thought to imperil our international balance of payments. In modern war then, in the preparation for war, and in the long liquidation of past wars, civilians who follow the flag abroad pose new burdens and risks. Methods of organization and discipline once important only to a small and self-conscious military fraternity, now in varying de-

grees, depending on time, geography, and international temperature, affect a whole society abroad and at home.

A more familiar allied constitutional question concerns the civil liberty of the man-at-arms in his nonmilitary affairs. Locke wrote in the eleventh chapter of his Second Treatise of Government:

> [T]o let us see that even absolute power, where it is necessary, is not arbitrary by being absolute, but is still limited by that reason. and confined to those ends which required it in some cases to be absolute, we need look no farther than the common practice of martial discipline; for the preservation of the Army, and in it of the whole commonwealth, requires an absolute obedience to the command of every superior officer, and it is justly death to disobey or dispute the most dangerous or unreasonable of them; but yet we see that neither the sergeant, that could command a soldier to march up to the mouth of a cannon, or stand in a breach where he is almost sure to perish, can command that soldier to give him one penny of his money; nor the general,. that can condemn him to death for deserting his post or for not obeying the most desperate orders, can yet, with all his absolute power of life and death, dispose of one farthing of that soldier's estate or seize one jot of his goods, whom yet he can command any thing, and hang for the least disobedience.

The draftsmen of our Bill of Rights were men of long memories; in 1789, when they formulated our fifth amendment, the Petition of Right of 1628, with its protest against extension of military procedures to civilians, was closer to them in time than we now are to their day. Yet they were satisfied to treat the separation of military from civil justice in only a few words. Perhaps the line between "cases arising in the land or naval forces" and other cases seemed clearer then than it now does.

At the outset, as in most constitutional controversies, one has here to begin making distinctions on which constitutional rights may depend. Despite the concept of "cold war" which blurs the difference between war and peace, there is still a difference between a nation situated as the United States was in 1943, and a nation in our present state. There is a difference between "forces in the field" and forces in garrison at home; Fort Dix is not Heartbreak

Ridge. There is a difference between matters overseas and matters at home; our airmen at a base in the peaceful English countryside are scarcely "in the field" in any conventional sense, yet their status is surely different from that of a like group of young men in Bedford, Massachusetts. There is still a difference between the Navy and the other armed forces; men sailing on or under the sea may be isolated for long periods; they are in a situation quite different from men in the ground forces stationed overseas but localized in a highly developed modern camp with abundant transportation and communication. There may well be a significant difference between the families of military men who accompany husbands and fathers on long tours of duty abroad, and, on the other hand, men who, though still called civilians, have engaged by contract to accompany armed forces to far places in the world and to support their military readiness by the exercise of scientific, technological, or administrative skills.

These and like considerations come to the mind of the reflective lawyer who reads *McElroy v. United States ex rel. Guagliardo*,[1] decided by the Supreme Court of the United States on the eighteenth day of January 1960. Guagliardo was a civilian technician, an electrical lineman under contract with the Air Force. He had not gone through the ritual of enlistment. His duties took him to Nouasseur Air Depot in Morocco, where he stole supplies. He was tried by court-martial under Article 2(11) of the Uniform Code of Military Justice, was convicted, and was sentenced to the disciplinary barracks at New Cumberland, Pennsylvania. He was released on habeas corpus by the Court of Appeals; the Supreme Court of the United States affirmed on the ground that he was not subject to a military trial. The American constitutionalist faced with *Guagliardo* and its companion cases [2] asks how they came to be so decided, and what is to be done hereafter with civilians

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[1] 361 U.S. 281 (1960).

[2] See Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); and Wilson v. Bohlender, reported with the *Guagliardo* case.

accompanying the armed forces overseas. Lessons may be learned from an attempt to answer both questions.

A facile answer to the first of these questions can account for the Supreme Court's treatment of Guagliardo, the civilian employee, by explaining that it is merely a legal extrapolation of the similar decisions three years earlier in the cases of wives of servicemen charged with capital offenses.[3] But this explanation may be a bit too easy. Four of the nine Justices dissented in *Guagliardo*. Mr. Justice Clark, who there wrote the prevailing opinion, had voted to uphold Mrs. Covert's military conviction. The prevailing and dissenting opinions of troubled, conscientious judges in Guagliardo's case demonstrate the difficulty of arriving at the conclusion the Supreme Court reached. I suggest that underlying *Guagliardo* and its companion cases, as well as the *Covert* and *Smith* cases of 1957, was one of those major premises which, as Holmes once wrote,[4] practical men generally prefer to leave inarticulate—that the military will not surely do reasonable justice, and that military jurisdiction must be restrained, even at serious cost in efficiency and money. The responsibility for this underlying premise is not limited to men in uniform. Great civilian leaders of the nation shared in the mistakes which produced that inarticulate premise. In justice to my one-time companions in the Services, I hasten to say that I do not here state that this premise is correct. I say that it exists. For it we must share the blame, and because of it, take the consequences.

One reads today the account of affairs in Hawaii which gave rise to *Duncan v. Kahanamoku*[5] with a sense of regret, with a feeling that this should not have happened.

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[3] In June 1957, the Supreme Court held invalid the military conviction of Mrs. Clarice Covert and Mrs. Dorothy Smith, on charges of murder of their husbands, servicemen stationed abroad. See Reid v. Covert, 354 U.S. 1 (1957). The case was tried together with Kinsella v. Krueger.

[4] See Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899); HOLMES, COLLECTED LEGAL PAPERS, 203, 209 (1920).

[5] 327 U.S. 304 (1946). See Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833 (1946).

There was no adequate reason, military or other, for the unseemly wrangle which continued as late as 1944 between military and civil administration in the Islands. Although today's critic must remember the stunning, tragic surprise of Pearl Harbor and the natural reaction of military commanders seeking to avoid a repetition, still wisdom is a necessity for senior men-at-arms who are governing a civil population. When military men forget this in a democracy, trouble follows.

The Japanese relocations on the West Coast are not now pleasant to remember. One finds himself defensive in explaining them. With all the sympathy in the world for the practical difficulties of counter-intelligence that has to be conducted by young men of good intention but no very deep experience, one wishes that the problems which gave rise to the relocations might have been settled some other way. One of the senior officers in charge of a large part of this operation officially reported as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken";[6] he did not, by this extraordinary statement, strengthen civilian confidence in the wisdom and responsibility of the military.

The reports of General Yamashita's trial did little to add to the trust of thoughtful people in military justice.[7] Accounts of the investigatory procedures in the *Malmedy* cases[8] had a similar effect. The difficulty is that people tend to believe the worst, and to characterize any régime by occasional deplorable incidents, not by generally commendable character. The thousands of court-martial cases in which military judges were restrained and conscientious, the distinguished record of able defense by military counsel,

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[6] See this statement quoted in Mr. Justice Murphy's dissenting opinion in Korematsu v. United States, 323 U.S. 214, 241 n.15 (1944).

[7] See *In re* Yamashita, 327 U.S. 1 (1946). One of the army officers assigned as counsel for General Yamashita wrote an account of his experiences; see REEL, THE CASE OF GENERAL YAMASHITA (1949).

[8] See Everett v. Truman, 334 U.S. 824 (1948), and the proceedings described in Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 597 (1949).

the scrupulous administrative review of cases in military channels, the poise and wisdom of the judgments of the United States Court of Military Appeals—none of these has sufficed to wipe out the memory of some conspicuous mistakes. And because these were the mistakes not of a few people, but mistakes unchallenged at the time by a great many of us, we must now share some of the responsibility for the inarticulate major premise of *Guagliardo*.

The first lesson, therefore, is that where a whole nation is to be recurrently in arms, the training and the practice of senior military men must be thoughtful and restrained and just. We can learn to reconcile this with taut and efficient discipline; we must do so, for failure either of discipline or of justice brings intolerable consequences in its train.

What can now be done with military justice for the civilian? This question can be answered in at least three ways, any of which brings difficulties. We can turn civilians, or some of them, into military men, or something sufficiently resembling military men, so that a trial like Guagliardo's becomes constitutional. Or we can accept the constitutional necessity for proceeding on criminal charges against civilians serving with the armed forces with all the formalities of Article III of the Constitution and the Bill of Rights. Or we can leave civilian justice to the courts of the nation where the civilian is stationed. Or we can sometimes follow one course, sometimes another. The first of these possibilities, turning civilians into military men, is suggested in the opinion of the Court in *Guagliardo*. The Court tells us that we might possibly proceed as the Navy did with its civilian paymaster's clerks.[9] The Court stressed the fact that the paymaster's clerk had a position important in the machinery of the Navy, that his appointment was made only on approval of the ship's commander, that he had permanent tenure "until discharged," and that he was required to agree in writing "to submit to

[9] See McElroy v. United States *ex rel. Guagliardo*, 361 U.S. 281, 284-86 (1960), citing *Ex parte* Reed, 100 U.S. 13 (1879).

the laws and requirements for the government and discipline of the Navy." All of these criteria could be made to apply to most civilian employees of the armed forces. They would not be so employed by the government for service abroad unless their service was important and unless some senior official approved their appointment. Tenure permanent until terminated does not seem a difficult condition to achieve. And voluntary acceptance of court-martial jurisdiction, as the *Guagliardo* opinion suggests, might eliminate some difficulties. But doubt lingers. Does a civilian, dressed in a uniform and relabeled a soldier, so simply lose the procedural guarantees which freed Guagliardo? And will well-paid and perhaps somewhat undisciplined civilian technicians "enlist" in sufficient numbers? And what of dependents?

Perhaps the second possibility is easier. Why not take a civilian Article III court overseas to the accused? The sixth amendment guarantee of a jury "of the State and district where the crime shall have been committed" seems not to apply to crimes committed abroad. We are accustomed to trying our nationals in the United States on charges of commission of civilian crimes in foreign countries. This was the situation in *Best v. United States*,[10] where the defendant was convicted in a district court of the United States in the District of Massachusetts on a charge of treason committed in Vienna, Austria, and in *Kawakita v. United States*,[11] where the treason occurred in Japan. There appears to be no constitutional obstacle preventing an Article III trial abroad. There is no provision in the fifth amendment guarantee of indictment by grand jury comparable to the provision in the sixth amendment concerning "the State and district wherein the crime shall have been committed." Under the conditions which obtain in a large American installation abroad, it would perhaps be possible to assemble a grand and petit jury from the military and civilian personnel available, and to commission a certain

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[10] 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951).
[11] 343 U.S. 717 (1952).

number of United States district judges, or to assign such judges from those already commissioned, to hold court on circuit in other countries. To be sure, jury service would require the time of some of our civilian and service personnel stationed abroad. The Supreme Court has held that civilian government employment is no disqualification for such service,[12] and no reason appears why military employment should disqualify either. Service wives might perhaps occupy some of the posts on grand and petit juries. There would be some delay involved. One would not expect to find a United States district judge immediately available at each of the several scores of foreign stations where our civilians may get into trouble. In posts where personnel are comparatively few, time might be required to assemble a grand and petit jury. Professional counsel, to which the civilian defendant is constitutionally entitled under the sixth amendment, might present a difficulty. But members of the Bar in uniform are nowadays available at a great many foreign posts, and these, it would seem, should fill the constitutional requirement for defense counsel in those instances where the accused could not afford or would not choose to obtain privately employed counsel for his defense.

A great many defendants might well waive a grand and petit jury once charges were brought, particularly when it became apparent that a speedy and fair trial could be had before a civilian judge. Experience in those jurisdictions where defendants on criminal charges may waive juries demonstrates that a great many do so in order to expedite disposal of their cases, or because they prefer the judgment of a trained and wise professional. And indeed, provision of civilian trials of the sort here suggested might be welcome to the military as relieving them of court-martial duties which take them away from the primary function of the man-at-arms.

If Article III trials for civilians abroad are constitutionally possible, they would be much preferable to a system

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[12] Frazier v. United States, 335 U.S. 497 (1948).

of bringing back to the United States for trial civilians who offend abroad. The inconvenience and delays occasioned by the transportation of witnesses back to the United States from Korea, Turkey, Germany or England while their military functions go unperformed, or are performed by substitute personnel, would be avoided if the offenses could be prosecuted where they occur. Some revision of the Status of Forces treaties would be necessary, and this might prove an obstacle embarrassing if not insuperable.[13] Still, this escape from the *Guagliardo* dilemma seems well worth study.

The third possibility remains—trial in the courts of the country where the offense occurs. This practice was constitutionally upheld in *Wilson v. Girard.*[14] It may in some instances be unwelcome to the personnel involved, though certainly the *Girard* record indicates a trial of scrupulous fairness.

For *Guagliardo,* as for most important human problems, no perfect solution free of any disadvantage seems possible. But the art of constitutional government is a practical one to be applied in a less than perfect world. If men were angels, we should need no trials among our forces abroad. But, in this somewhat unlikely state of affairs, we should need no forces either.

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[13] The possibility that civilian courts of the United States may administer criminal justice over United States nationals in certain British territories appears in an agreement of August 1, 1950, concerning leased naval and air bases. See [1950] *U.S. Treaties and Other International Agreements* 585. For the peculiarities of civilian jurisdiction in the Ryukyu Islands, see Schuck, *Trial of Civilian Personnel by Foreign Courts,* PROCEEDINGS OF AM. BAR ASS'N, SECTION OF INT'L AND COMP. LAW 62 (1958). The difficulties in the way of renegotiating Status of Forces Agreements so as to permit our civilian offenders to be tried abroad by our civilian courts, when their offenses are also crimes under the law of the country where committed, are discussed in the *Report of the Committee on Status of Forces Agreements,* PROCEEDINGS OF AM. BAR ASS'N, SECTION OF INT'L AND COMP. LAW 120 (1959). For generous help in consideration of the problem of holding civilian trials abroad and for the references here made I am much indebted to my colleague, Professor Richard R. Baxter. He is not chargeable with any of my mistakes. This paper would be much better if I could have written it with his great background in military life and in the practical application of international law.

[14] 354 U.S. 524 (1957).